

**Elder Justice Committee
of Metro Justice**

TESTIMONY

**Joint Fiscal Committees
Budget Meeting on Health
February 25, 2021**

**State Budget Items Impacting
Nursing Home Residents
State Fiscal Year (SFY) 2021-2022**

(Proposed by the Governor – January 19, 2021)

Thank you for the opportunity to testify. My name is MaryDel Wypych, co-chair of the Elder Justice Committee of Metro Justice, a volunteer advocacy organization which began in Rochester, New York. For many years our members have advocated for seniors, particularly those residing in nursing homes and related facilities. We are informed by the concerns of our members, other New York State seniors and family members and front-line nursing home workers. The position of Elder Justice Committee is also informed by other advocates and experts in the area of health, safety and care of nursing home residents.

COVID-19 not only caused the deaths of 15,000 deaths of NYS residents of nursing homes also shed a light on the long-time neglect and inaction by both the NYS and Federal Governments to nursing homes which contributed to the fatalities. The New York State Legislature and Governor Cuomo must act now to solve problems in three important areas:

- **Staffing Levels in nursing homes**
- **NYSDOH Oversight and Regulation of nursing homes**
- **For Profit entities that put profit above resident health, safety and quality of care in nursing homes**

STAFFING LEVELS

Over 20 years of research has shown an association between the number of staff caring for residents and physical, cognitive and emotional outcomes. A 5 Star Rating System (1 = well below average; 5 = well above average) is used by the Centers for Medicare and Medicaid Services to assess nursing homes in the areas of Health Inspections, Staffing Levels, Quality Measures and Overall Rating.

Using the 5 Star Rating System, the NYS Attorney General's report of January 28, 2021 compared staffing levels and the health, safety and care of NYS nursing home residents. The report supported the association between staffing levels and the health, safety and care of NYS nursing home residents. The report found that the percentage of deaths in nursing homes was associated with the Star Ratings for Staffing Levels. The highest rates of deaths were found in facilities with 1-2 Star ratings (below and well below average). The report also found that nursing homes with low staffing levels did not adhere as well to proper infection control procedures which are crucial to mitigating spread of disease.

Current NYS staffing standards only require 1 Registered Nurse (RN) to be available for 8 consecutive hours and 1 RN or Licensed Practical Nurse (LPN) to act as a "charge nurse" for each shift for each unit or proximate unit. Further, the standards only require "sufficient" nursing staff and direct care service staff to care for residents who require high levels of assistance for their medical, social, cognitive and self-care needs. Pre-COVID, less than 10% of NYS nursing homes met the Federal Guidelines of 4.1 direct care hours per day or 1 staff for care of 6 residents on both day and evening shifts, 7 days a week. During the COVID pandemic, staffing levels have been reported as 1 staff for 20-30 residents or worse.

For many years, researchers, labor and nursing unions and advocates have pushed for staffing regulations. The NYS Attorney General's January 28, 2021 report recommended staffing levels be raised above what the low Star ratings of most NYS nursing homes indicate.

Recommendations:

- *Elder Justice Committee of Metro Justice asks that the New York State Legislature pass legislation to regulate minimum safe direct care staffing levels.*

A00108 (Gunther)/S01168 (Rivera)

to ensure that nursing homes provide staffing levels necessary for safe and good care to nursing home residents with adequate direct care staffing levels.

NYSDOH OVERSIGHT AND REGULATION of NURSING HOMES by NYSDOH

The health and safety of residents is the responsibility of the NYSDOH. The NYSDOH is charged with assuring that nursing homes adhere to federal and state regulations through review and in-person assessments of nursing homes policies and practices. Its survey teams conduct in-person inspections roughly once a year and the inspections are summarized into CMS Star Ratings noted above. Infractions of federal and state regulations are reported and deficiencies are rated.

By law, every nursing home receiving Medicare or Medicaid payment must undergo a standard survey during which teams of state surveyors conduct a comprehensive on-site evaluation of compliance with federal quality standards. These surveys must occur at least once every 15 months, with a statewide average interval for surveys not to exceed 12 months.

CMS categorizes deficiencies into one of three scope categories based on whether the incident was: (1) an isolated occurrence; (2) a part of a pattern of behavior; or (3) a widespread behavior. CMS categorizes deficiencies into one of four severity categories based on whether the deficiency constitutes: (1) no actual harm with a potential for minimal harm; (2) no actual harm with a potential for more than minimal harm, but not immediate jeopardy; (3) actual harm that is not immediate jeopardy; or (4) immediate jeopardy to resident health or safety.

CMS guidance does not require enforcement actions be imposed for all deficiencies. Enforcement actions include, but are not limited to, directed in-service training, fines known as civil money penalties, denial of payment, and termination from the Medicare and Medicaid programs. (Government Accounting Office, May 20, 2021)

According to the Government Accounting Office (GAO) May 20, 2021 report of 533 inspections conducted in 2017, 21% of NYS nursing homes had infection prevention and control deficiencies. These included not using proper hand hygiene or failing to implement preventative measures during infectious disease outbreaks such as isolating residents or using PPE. Further, the GAO found 25% of NYS nursing homes were cited for infection control deficiencies in multiple consecutive years and that infection control deficiencies were “widespread and persistent in nursing homes prior to COVID-19 Pandemic.”

NYSDOH inspectors have been found to be reluctant to report infractions as “Harm to Resident,” even when the observation by the inspectors shows egregious actions or descriptions of health, safety and environmental problems. In fact, fewer than 2% of health and safety deficiencies in NYS nursing homes were given the “Harm” designation between September, 2016 and August, 2018. Nursing homes are rarely fined for violations and even when fines are levied, they are small and meaningless to operators. In 2019 the average annual fine was \$622.

This history of deficiencies with no accountability caused NYS nursing homes to not be ready the COVID-19 pandemic. Even with government guidance and financial assistance, many nursing homes continued to have inadequate infection control policies and procedures contributing to the deaths of 15,000 residents. The Attorney General’s report of January 28, 2021 found that many facilities were not prepared to handle the COVID-19 pandemic as they did not have adequate infection control protocols and procedures.

The report recommended that operators of facilities are held accountable for infection control protocols, training and compliance and that the NYSDOH needs to improve oversight through surveys, inspections and complaint assessment.

Recommendations:

- *Elder Justice Committee of Metro Justice asks the NYS Legislature take action to improve the NYSDOH oversight and regulation of nursing homes by requiring the NYSDOH to:
 - * Perform more frequent and unannounced nursing home inspections.
 - * Enforce regulations more strictly by utilizing meaningful fines for serious infractions, both during and after the pandemic.
 - * Put into receivership or have licenses to operate revoked nursing homes that continually fail to deliver sufficient resident safety and quality of life
 - * Set standards for infection control audits
 - * Adopt a model infectious disease exposure prevention standard*
- *Elder Justice Committee of Metro Justice asks that the most recent Centers for Medicare and Medicaid Services CMS rating be made available on the DOH website*
- *Elder Justice Committee of Metro Justice asks that nursing home inspections, including violations and fines incurred be made available on the DOH website*

A1999 (Gottfried) S1783 (Skoufis)

to direct the department of health to establish and implement an infection inspection audit and checklist on residential care facilities, nursing homes and long-term care facilities

A232 (Gottfried)

to increasing monetary penalties for public health violations and providing support for nursing home quality improvement demonstration program

S00553 (Sanders) A02037 (Dinowitz)

to require that the most recent Centers for Medicare and Medicaid Services (CMS rating), be prominently displayed on the home page of the department's website and conspicuously at each nursing home facility and on their website or webpage, available to the residents and public

A1010 (Bronson) S2022 (May)

to require that nursing home inspections be made public and to publish a study of practices utilized in nursing homes and residential health care facilities to identify best practices during the pandemic

THE EFFECT OF OWNERSHIP of NURSING HOMES by LARGE FOR-PROFIT ENTITIES AND THE PROCESS INVOLVED

Sales of not for profit, public and some for-profit nursing homes to for-profit entities who buy nursing homes as investments with the primary goal of maximizing financial returns results in declines in staffing levels, wages, supplies, training, safety, and care of residents. Putting profits above care results in serious consequences for residents.

The usual sale involves the operating certificate, building and property. Other transactions and changes include contracting services such as payroll, accounting, food services, supplies, and consulting to business the owners have financial ties with.

In New York State there are few restrictions of purchases of nursing homes by corporations with a history of poor quality of care. The New York State Public Health and Health Planning Council (PHHPC) is charged with approving such sales. It has been asserted that, based on the histories of the proposed owners, some sales should not have been approved. This position was affirmed by the NYS Attorney General's January 28, 2021 report. The report stated that greater than 401 or 60% of NYS nursing homes are for-profit. The report also found that 280 for-profit nursing homes accounted for half the COVID-19 deaths of residents. Two thirds of the 401 for-profit facilities had staffing ratings of 1 or 2 (below and well below average) and that low staffing ratings were associated with rates of resident COVID-19 deaths.

Revenue is collected by the for-profit entities with little to no accountability or transparency. For-profit nursing homes have been found to have a higher number of deficiencies and lower staffing numbers than other nursing homes. Although the for-profit nursing homes cry difficulties breaking even, the number of purchases of nursing homes continues to increase.

Non-profit nursing homes are required to publicly account for how their funds are spent to care for residents. For-profit nursing homes are not. Currently there is no oversight as to how much money is used for care and services and how much is taken for profit. Operators may hide profits in related third-party transactions and outsourcing services, subcontracts, and real estate transactions in which they have a financial interest.

Unlike insurance companies, which are required to use a percentage of premiums on health care services (Medical Loss Ratio), nursing homes do not have to account for how much publicly funded Medicaid money is used for direct care.

The Attorney General January 28, 2021 report recommended that the disclosure of all monies transferred to related parties, salaries and compensations to owners, officers and investors be required and that all nursing homes be required to demonstrate transparency of financial transactions and relationships between nursing home operators and related parties, including use of funds for operating costs. Additionally, it was recommended that a condition of payment of public funds to nursing homes should require operators to monthly prove adequate staffing levels.

Recommendations:

- *The Elder Justice Committee of Metro Justice asks NYS to end the purchase of nursing homes by entities that have a history of inadequate care and safety of residents.*
- *The Elder Justice Committee of Metro Justice asks for a thorough investigation by an independent body of NYS government with legislative oversight into the profiteering and poor standards of care by for-profit facilities.*
- *The Elder Justice Committee of Metro Justice asks the Public Health and Health Planning Council (PHHPC) to end the approval process for the purchase of Nursing Homes by for-profit entities, including owners of low rated and/or low staffed nursing homes or their relatives, from purchasing additional homes.*
- *The Elder Justice Committee of Metro Justice asks The PHHPC improve its process of reviewing and approving changes in ownership through the Certificate of Need Process.*
- *The Elder Justice Committee of Metro Justice asks the PHHPC improve its process of reviewing and approving changes in ownership through the Certificate of Need Process to allow public meaningful participation in the process:*

- * Add consumer members to the PHHPC*
- * Require public notice of an ownership change application within one month of DOH receipt of the application and incorporate public comment*
- * Notify residents, their families, or representatives and NYS Long Term Care Ombudsman Program and include clear instructions on how to submit public comments.*

A03622 (Hawley) **S02705** (Ortt)

to impose a moratorium on nursing home owners buying nursing homes if the owners own or have owned nursing homes with uncleared violations in and requires full disclosure of partnerships, spouses, firms that have more than a ten percent interest in the entity

A00986 (Gottfried) **S00869** (Hoylman)

to adjust total PHHPC membership from 26 to 24, excluding the Commissioner of Health. Additionally, it would require that two shall be representatives of health care consumer advocacy organizations.

S04336 (Rivera)

to require nursing homes to report revenue and at least 70% of income be used for Direct care wages and expenses relating to care of residents

S03030 (Rivera)

to require operators of nursing homes and residential health care facilities to provide notification of certain contracts and agreements to all residents, representatives, staff and the office of the long-term care ombudsman

In summary, Elder Justice Committee of Metro Justice calls on Governor Cuomo and the State Legislature to revolutionize the nursing home industry by passing legislation that forces nursing homes to comply with standards of health, safety quality care and decency. We ask you to pass legislation now.

Thank you for the opportunity to submit testimony.

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